IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-36299

RICHARD JOSEPH ZANCO
f/d/b/a CAJUN'S AUTO
DIANE ELIZABETH ZANCO

Debtors

KNOXVILLE TVA EMPLOYEES CREDIT UNION

Plaintiff

v. Adv. Proc. No. 04-3026

RICHARD JOSEPH ZANCO and
DIANE ELIZABETH ZANCO

Defendants

MEMORANDUM ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

APPEARANCES: HODGES, DOUGHTY & CARSON, PLLC
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The Plaintiff, Knoxville TVA Employees Credit Union, filed the Complaint initiating this adversary proceeding on February 10, 2004, objecting to the Debtors' discharge, or, in the alternative, seeking a determination that debts owed to the Plaintiff by the Debtors are nondischargeable. The Debtors filed an Answer on March 26, 2004, denying the Plaintiff's allegations and requesting dismissal of the adversary proceeding.

Presently before the court is the Motion for Summary Judgment filed by the Plaintiff on July 21, 2004. The Motion is supported by a Memorandum of Law, as required by E.D. Tenn. LBR 7007-1, together with five exhibits: (1) the Debtors' bankruptcy statements and schedules; (2) the Debtors' Answers to Request for Admissions and Interrogatories dated June 22, 2004; (3) the Affidavit of Louis L. Owens; (4) the Affidavit of William T. Hendon, Chapter 7 Trustee; and (5) certified copies of records from the Louisiana Office of Motor Vehicles concerning a 1969 Ford Mustang automobile. The Debtors did not file a response to the Motion, and "[their] failure to respond shall be construed by the court to mean that the [Debtors do] not oppose the relief requested by the motion."[1] E.D. Tenn. LBR 7007-1.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) and (J) (West 1993).

I

The Debtors filed the Voluntary Petition commencing their Chapter 7 bankruptcy case on November 13, 2003. The Plaintiff is a creditor of the Debtors by virtue of a Note dated

[1] Because the Debtors' discharge is at stake, the court will not summarily grant the Plaintiff's Motion for Summary Judgment notwithstanding that the Motion is not opposed by the Debtors. Rather, the court will analyze the motion pursuant to the requirements of Federal Rule of Civil Procedure 56(c).

June 9, 2003, with Mr. Zanco, and a Note dated July 11, 2003, with both Debtors. These Notes were secured by collateral that was repossessed and liquidated pre-petition, such that, as of the date upon which the Plaintiff filed this adversary proceeding, the total amount owed on the Notes was $18,966.78 plus interest and attorneys' fees.

The Plaintiff alleges in its Complaint that the Debtors should be denied their discharge pursuant to 11 U.S.C.A. § 727(a)(2)(A) and (a)(4)(A) (West 1993), based upon their pre-petition transfers of property and their false oaths relating thereto. Additionally, the Plaintiff avers that the Debtors obtained the loans evidenced by the Notes with the Plaintiff through the use of false financial statements, justifying a determination that the loans are nondischargeable under 11 U.S.C.A. § 523(a)(2)(B) (West 1993). The Plaintiff now seeks summary judgment denying the Debtors' discharge under § 727(a)(4) for false oaths made in the Statements and Schedules filed in their bankruptcy case and for false testimony given at their meeting of creditors.

II

Rule 56 of the Federal Rules of Civil Procedure allows summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c) (applicable to adversary proceedings under Federal Rule of Bankruptcy Procedure 7056). When deciding a motion for summary judgment, the court does not weigh the evidence to determine

the truth of the matter, but instead, simply determines whether a genuine issue for trial exists. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986).

The moving party bears the initial burden of proving that there is no genuine issue of material fact, thus entitling it to judgment as a matter of law. *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). The burden then shifts to the nonmoving party to produce specific facts showing a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986) (citing FED. R. CIV. P. 56(e)). The nonmoving party must cite specific evidence and may not merely rely upon allegations contained in the pleadings. *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000). The facts and all resulting inferences are viewed in a light most favorable to the non-moving party, *Matsushita*, 106 S. Ct. at 1356, whereby the court will decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 106 S. Ct. at 2512. "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 106 S. Ct. at 2510.

III

Generally, Chapter 7 debtors receive a discharge of their pre-petition debts under 11 U.S.C.A. § 727, unless one of ten express limitations exists. Section 727 provides, in material part:

(a) The court shall grant the debtor a discharge, unless—

. . . .

> (4) the debtor knowing and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account[.]

11 U.S.C.A. § 727. These limitations furnish creditors with "a vehicle under which *abusive* debtor conduct can be dealt with by denial of discharge." *Blockman v. Becker (In re Becker)*, 74 B.R. 233, 236 (Bankr. E.D. Tenn. 1987) (quoting *Harman v. Brown* (*In re Brown)*, 56 B.R. 63, 66 (Bankr. D.N.H. 1985)).

Courts construe § 727(a) liberally in favor of debtors, and the party objecting to discharge bears the burden of proof by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *Barclays/Am. Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393 (6th Cir. 1994); FED. R. BANKR. P. 4005. For a denial of discharge under § 727(a)(4)(A), the objecting party must prove: (1) that the debtor made a statement while under oath; (2) that was false; (3) that the debtor knew that the statement was false when making it; (4) that the debtor had fraudulent intent when making the statement; and (5) the statement materially related to the bankruptcy case. 11 U.S.C.A. § 727(a)(4)(A); *Keeney*, 227 F.3d at 685; *Buckeye Retirement Co., L.L.C. v. Heil (In re Heil)*, 289 B.R. 897, 907 (Bankr. E.D. Tenn. 2003).

Debtors execute their statements and schedules under oath or under penalty of perjury. FED. R. BANKR. P. 1008; OFFICIAL FORM 1 (Voluntary Petition); OFFICIAL FORM 7 (Statement of Financial Affairs); *Heil*, 289 B.R. at 907 (citing *Hamo v. Wilson (In re Hamo)*,

233 B.R. 718, 725 (B.A.P. 6th Cir. 1999) and *Beaubouef v. Beaubouef* (*In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992)). Moreover, statements made by debtors at their meetings of creditors, held pursuant to 11 U.S.C.A. § 341 (West 1993 & Supp. 2004), are made under oath. *Heil*, 289 B.R. at 907; *see also* 11 U.S.C.A. § 343 (West 1993) ("The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. . . ."); FED. R. BANKR. P. 2003(c).

The objecting party may evidence a debtor's knowledge that statements are false by demonstrating that the debtor "'knew the truth, but nonetheless failed to give the information or gave contradictory information.'" *Heil*, 289 B.R. at 908 (quoting *Hamo*, 233 B.R. at 725 and *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 158 (Bankr. N.D. Ohio 1998) (citing *Pigott v. Cline (In re Cline)*, 48 B.R. 581, 584 (Bankr. E.D. Tenn. 1985)). Material representations and/or omissions that a debtor knows are false or will create an erroneous impression constitute fraudulent intent. *Heil*, 289 B.R. at 908 (citing *Keeney*, 227 F.3d at 685). Accordingly, "[a] reckless disregard or indifference for the truth also demonstrates fraudulent intent." *Heil*, 289 B.R. at 908. The court may also infer intent based upon a debtor's conduct, including "a continuing pattern of omissions and/or false statements in the debtor's bankruptcy schedules." *Heil*, 289 B.R. at 908.

Statements are material for the purposes of § 727(a)(4)(A) if they "bear[] a relationship to the [debtor's] business transactions or estate, or concern[] the discovery of assets, business dealings, or the existence and disposition of property." *Keeney*, 227 F.3d at

686 (quoting *Beaubouef*, 966 F.2d at 178). Likewise, a claim is "material if it hinders the administration of the [bankruptcy] estate." *Calisoff v. Calisoff (In re Calisoff)*, 92 B.R. 346, 355 (Bankr. N.D. Ill. 1988).

Here, the Plaintiff objects to the Debtors' discharge on the basis that they filed materially inaccurate and/or false Statements and Schedules, with transfers of property intentionally omitted, followed by false testimony given at their meeting of creditors regarding these omissions. As a primary matter, the Debtors attended their meeting of creditors on December 23, 2003, and were placed under oath. EX. D, AFF. W. HENDON, at ¶ 2. Additionally, the Chapter 7 Trustee, William T. Hendon, "asked the debtors if they went over their 'bankruptcy papers' with their lawyer, and if they were true and correct, and the response was yes." EX. D, AFF. W. HENDON, at ¶ 3.

The first omission cited by the Plaintiff is the October 3, 2003 transfer of a 1969 Ford Mustang (Mustang) from Mr. Zanco to Garrell S. Adams, Jr. for $200.00, which is reflected in the motor vehicle records from the Louisiana Office of Motor Vehicles attached to the Plaintiff's Motion. *See* COLL. EX. E. However, on the Debtors' Statement of Financial Affairs, under the section for "other transfers," the Debtors represent that no property had been transferred within one year prior to their bankruptcy filing. *See* COLL. EX. A. When questioned about this transfer at the meeting of creditors, "Mr. Zanco admitted that he had owned the Mustang, but had transferred the vehicle a couple of months earlier to Scott Bright. This transfer was not disclosed in the debtors' statement of financial affairs." EX. D, AFF. W. HENDON, at ¶ 4. Moreover, in the Debtors' Answers to Request for Admissions and

Interrogatories, the Debtors denied an admission that they sold the Mustang to Mr. Adams, explaining that "[t]he car was sold to Scott Bright in its wrecked condition approximately 8 months prior to January 6, 2004." EX. B. Nevertheless, as confirmed by records of the Louisiana Office of Motor Vehicles, Mr. Zanco executed a Bill of Sale dated October 3, 2003, with Mr. Adams for the sale of the Mustang for $200.00. COLL. EX. E.

The second omission referred to by the Plaintiff is the transfer of a pontoon boat sometime in 2003 for $6,500.00. In their Answers to Request for Admissions and Interrogatories, the Debtors admitted that they sold the boat through a consignment arrangement with Trotter Auction, but they could not recall the date. *See* EX. B at ¶ 4. Nonetheless, this transfer was not reflected within their Statement of Financial Affairs. *See* COLL. EX. A.

The third omission relied upon by the Plaintiff is the Debtors' ownership of a 1993 Ford Taurus (Taurus) that was purchased on March 26, 2003. The Debtors still owned the Taurus when they filed their bankruptcy petition and when they attended their meeting of creditors. However, this automobile was not listed in the Debtors' Schedule B. *See* COLL. EX. A. The Debtors subsequently sold the Taurus to Louis L. Owens on February 6, 2004, for $1,200.00. EX. C, AFF. L. OWENS, at ¶ 4. They did not provide Mr. Owens with a Bill of Sale, but "the title and registration was processed through the Sevier County Clerk's Office by Mrs. Zanco." EX. C, AFF. L. OWENS, at ¶ 4. Additionally, at the meeting of creditors, the Chapter 7 Trustee directly inquired of the Debtors whether they owned any other cars, trucks, or other vehicles besides the one listed in their Statements and Schedules. EX. D, AFF. W. HENDON, at

¶ 3. At that time, the Debtors disclosed their ownership and transfer of a 1994 Camaro approximately six weeks prior to their meeting of creditors, but they made no mention of the Taurus. EX. D, AFF. W. HENDON, at ¶ 3.

Based upon the proof presented by the Plaintiff, the court finds that no genuine issue as to any material fact exists, and the Plaintiff is entitled to summary judgment as to the denial of the Debtors' discharge pursuant to § 727(a)(4)(A). First, the Statements and Schedules submitted by the Debtors are false and/or misleading, containing material omissions. It is undisputed that the Statement of Financial Affairs does not list at least three transfers of property, the Mustang, a 1994 Camaro, and a pontoon boat, that occurred within one year of the Debtors' bankruptcy filing. Additionally, it is undisputed that the Debtors' Schedule B did not list the Taurus that was sold, post-petition, for $1,200.00. Compounding these blatant omissions in their Statements and Schedules is the Debtors' failure to disclose this information to the Chapter 7 Trustee at their meeting of creditors. The Chapter 7 Trustee put the Debtors under oath and specifically asked them if their Statements and Schedules were correct, to which they answered in the affirmative. The Debtors had ample opportunity to cure the defects in their Statements and Schedules; however, they instead played upon those omissions, evidencing to the court fraudulent intent.

While the evidence reflects that Mr. Zanco actually made the transfers and gave the false testimony to the Chapter 7 Trustee regarding the disposition of the automobiles, the court also finds Mrs. Zanco possessed the requisite fraudulent intent, or at the very least, a reckless disregard for the truth. She executed the Statements and Schedules, under oath. She

also executed the Answers to Request for Admissions and Interrogatories regarding the undisclosed disposition of the pontoon boat and the actual disposition of the Mustang. Additionally, according to the Affidavit of Mr. Owens, it was Mrs. Zanco who had the title and registration processed by the Sevier County Clerk's Office following his purchase of the Taurus in February 2004, leading the court to conclude that she was sufficiently aware that the documents she filed and the statements that she failed to make at the meeting of creditors were false and/or misleading.

Taking all of the evidence together, the court finds that the Debtors intentionally made false statements, under oath, both in their Statements and Schedules and at their meeting of creditors. Accordingly, the Debtors' discharge will be denied, and the Plaintiff is entitled to judgment as a matter of law. The Plaintiff's Motion for Summary Judgment will be granted, and the Debtors shall be denied their discharge.[2]

[2] The denial of the Debtors' discharge under § 727(a)(4)(A) is wholly dispositive of this adversary proceeding and moots the Plaintiff's § 523(a)(2)(B) nondischargeability action.

An order consistent with this Memorandum will be entered.

FILED: August 26, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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O R D E R

For the reasons set forth in the Memorandum on Plaintiff's Motion for Summary Judgment filed this date, the court directs the following:

1. The Complaint filed by the Plaintiff on February 10, 2004, objecting to the Defendants' discharge is SUSTAINED.

2. The discharge of the Defendants, Richard Joseph Zanco and Diane Elizabeth Zanco, is DENIED pursuant to 11 U.S.C.A. § 727(a)(4)(A) (West 1993).

SO ORDERED.

ENTER: August 26, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE